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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 824.

WILLARD DAIRY CORPORATION,
Petitioner,

vs.

NATIONAL DAIRY PRODUCTS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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NATIONAL DAIRY PRODUCTS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

To: *The Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Willard Dairy Corporation, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Sixth Circuit, rendered in this cause on November 16, 1962.

A. OPINIONS OF COURT BELOW.

The opinion delivered by the Court of Appeals for the Sixth Circuit in this cause is styled *Willard Dairy Corporation vs. National Dairy Products Corporation, et al.*, and is reported in 309 F. 2d 943 and CCH 1962 Trade cases, para. 70,556. A copy of said opinion is appended to this petition. There is no opinion of the District Court.

B. JURISDICTIONAL STATEMENT.

The grounds on which the jurisdiction of this Court is invoked are:

i. The date of the judgment sought to be reviewed is November 16, 1962 and the time of its entry in the Court of Appeals is November 16, 1962. The judgment of affirmance was entered in the office of the Clerk of the District Court for the Northern District of Ohio, Western Division on the 12th day of December, 1962.

ii. There was no order respecting a rehearing and no order granting an extension of time within which to petition for certiorari;

iii. The statutory provision believed to confer on this Court jurisdiction to review the judgment in this cause by writ of certiorari is Section 1254(1) of Title 28 of the United States Code.

C. QUESTION PRESENTED FOR REVIEW.

Whether the Court of Appeals should have affirmed the order of the District Court granting summary judgment for respondent on the ground that there was no genuine issue as to whether there was interstate commerce involved within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U. S. C. Section 13(a)) where petitioner and respondent were competing sellers in an wholly intrastate market and where there are facts in the record showing that respondent made interstate sales of goods of like grade and quality at prices different from those charged in said intrastate market and where respondent's interstate sales were made in areas where petitioner did not compete with respondent.

D. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED.

The *Clayton Act* as amended by the *Robinson-Patman Act*, 15 U. S. C. § 13(a) (pp. 20-21, *infra*).

15 U. S. C. § 12 (p. 19, *infra*).

28 U. S. C. § 1254(1) (p. 20, *infra*).

Rule 56, Federal Rules of Civil Procedure (p. 19, *infra*).

E. STATEMENT OF THE CASE.

This is a civil action brought in the United States District Court for the Northern District of Ohio, Western Division, by Willard Dairy Corporation, petitioner herein, against National Dairy Products Corporation, respondent herein, and also against Sealtest, Inc. Petitioner does not seek a review of the lower court's judgment as it relates to Sealtest, Inc. The action is one for treble damages under the Clayton Act, as amended by the Robinson-Patman Act 15 U. S. C. § 13(a), which statute is the basis of federal jurisdiction in the district court. The district court granted the motion of respondent for summary judgment under the provisions of Rule 56, Federal Rules of Civil Procedure, and entered judgment in favor of respondent. An appeal from said judgment was taken by petitioner to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the judgment of the District Court.

The Court of Appeals based its affirmance of the District Court's entry of Summary Judgment upon there being no genuine issue presented as to there being commerce involved within the meaning of Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a).

Petitioner operates a dairy in the City of Willard, Huron County, Ohio, and distributes milk and other dairy products within a radius of about forty (40) miles of Willard, all of petitioner's products being distributed within the State of Ohio. Respondent is also a processor of milk and other dairy products and has many dairy plants, at least eight in Ohio. Respondent's Ohio plants are located in the cities of Akron, Ashtabula, Canton, Cleveland, Lima, Shelby, Toledo and Youngstown. Petitioner and respondent compete in the wholesale of milk in half gallon containers both in paper cartons and glass bottles, petitioner's product being processed in and distributed from its only plant in Willard and respondent's product being distributed from its Shelby plant. Respondent's product distributed in paper cartons was processed in the Shelby plant while that distributed in glass bottles was processed in either the Cleveland plant or the Lima plant or both. Respondent is engaged generally in interstate commerce. The City of Wheeling and Ohio County, West Virginia did, in 1958 and for several years prior thereto, issue milk dealer's permits to respondent's Canton, Ohio, plant. Respondent's Toledo, Ohio, plant distributed milk into Tecumseh, Michigan, until at least October 24, 1958, and for about five years prior thereto.

For about two months prior to October 20, 1958, petitioner and respondent sold milk throughout the area in which they compete in glass bottles for 38 cents per half gallon and in paper cartons at 41 cents per half gallon. On October 20, 1958, respondent reduced its prices to 33 cents per half gallon in glass bottles and to 36 cents in paper cartons. Respondent reduced its prices throughout the area in which petitioner and respondent compete and maintained its previously existing prices in the area in and around the city of Marion, Ohio, which area was served by the Shelby plant. Neither did respondent reduce its prices

in the area in and around Tecumseh, Michigan, which area was served by respondent's Toledo plant. A price different from that charged in the area where petitioner and respondent compete was charged by respondent in Tecumseh.

Upon respondent's price reduction petitioner and other of respondent's competitors were required to make corresponding reductions in their prices in order to remain competitive and to retain their respective customers. This price reduction was admitted by respondent to be a drastic reduction. It was also a loss price and had it continued for much longer, petitioner would have been forced out of business.

There is evidence in the record that respondent's motive for the drastic price reduction was to coerce a competitor other than petitioner, Page Dairy Company, to increase its wholesale prices in another Ohio market area, the Lorain-Elyria area, by forcing Page Dairy to meet the reduced price of respondent in the Shelby area, where Page's volume was relatively large and respondent's volume was relatively small.

ARGUMENT.

The decision of the Court of Appeals, in affirming the District Court's entry of summary judgment based upon there being no genuine issue as to whether there was interstate commerce involved within the meaning of the Clayton Act as amended by the Robinson-Patman Act has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner respectfully reminds the court that the argument here and in the courts below is whether there is presented in the instant case a genuine issue as to there being "commerce" involved and not whether petitioner has met the burden of resolving that issue which it would have upon a trial of the cause.

The Court of Appeals discussed the general effect of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a), and held that the sales or transactions complained of must have actually occurred in interstate commerce (pp. 16-17, *infra*). In referring to the instant case the court held that the fact that respondent made interstate sales from other than its Shelby plant to areas in which petitioner did not engage in business is immaterial to the issue in the case (p. 18, *infra*).

The sales complained of by petitioner were those made by respondent in the wholly intrastate market in which the parties compete, those made in the area of competition at prices drastically reduced from prices prevailing theretofore. The reduced prices were charged throughout the area serviced by respondent's Shelby plant except for the area in and around Marion, Ohio. This distinction was made for the purpose of showing where, in the general area where petitioner engages in business, the price reduction was effected and petitioner did not undertake the monumental, if not impossible, task of stating all the areas in which respondent operates where the price was not reduced or where a different price was charged. As recited by the Court of Appeals, the fact of respondent's interstate shipments is in the record (p. 18, *infra*). As a fact in the record is an interstate sale by respondent at a price different from that charged in the area of competition between the parties (50a).

Given these facts, the question of whether there is a genuine issue as to there being commerce within the statute can, under the applicable decisions of this Court, be answered only in the affirmative.

F. T. C. v. Anheuser-Busch, Inc., 363 U. S. 536 (1960);

Moore v. Meads Fine Bread Co., 348 U. S. 115 (1954).

By requiring that the very sales complained of be made in the course of commerce, the court of appeals has added as a requirement a factor clearly foreign to the decision in the *Moore* case. There the plaintiff was a baker whose activities were entirely intrastate. Defendant was a corporation which, together with other interlocked corporations, operated baking businesses at five locations in two states. In response to what defendant considered a boycott, defendant cut its bread prices in the area where defendant and plaintiff competed but maintained its prices for the plant whose products competed with those of plaintiff in at least one city in another state where defendant and plaintiff did not compete and further maintained its prices for products sold from its other plants, the products from such other plants not being sold in competition with plaintiff. The resultant price war forced the plaintiff out of business. The court of appeals had reversed the judgment of the district court for the plaintiff on the ground that the injury resulting from the price cutting was to a purely local competitor whose business was in no way related to interstate commerce. This Court unanimously reversed the court of appeals and affirmed the judgment of the district court. In the opinion by Mr. Justice Douglas the following is stated:

> "The Court of Appeals read the antitrust laws as reaching local transactions only where: (1) the local restraint has an effect on the free flow of interstate commerce; or (2) the restraint on or the monopoly of local trade is effected through the utilization of interstate mechanisms; or (3) local prices are fixed by the use of interstate commercial transactions; or (4) the discriminatory sales are to purchasers who compete in interstate commerce; or (5) interstate commerce is in some other way used to destroy competition or is injured or impaired as a result of unlawful acts.

"We think that the practices in the present case are also included within the scope of the anti-trust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.

"It is we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." (348 U. S. 115 at 118.)

The *Moore* case makes it clear that there is neither a requirement that petitioner himself be engaged in commerce nor a requirement that the very sale complained

of be made in the course of commerce. The *Moore* case also makes it clear that there is no requirement, as indicated by the Court of Appeals, that petitioner engage in business and compete with respondent in the areas where respondent made interstate sales.

Although the Court of Appeals here did not question that the Robinson-Patman Act protects primary line competition as well as secondary line competition, it based the decision upon the same, or very similar, rationale which the Court of Appeals erroneously applied in the *Anheuser-Busch* case. In that case the Court of Appeals had held as a requirement that a primary line plaintiff must show that different prices were charged to competing purchasers. This Court rejected that factor as a requirement in a primary line case, although stating that the factor of competition between purchasers paying different prices is important in secondary line cases. Petitioner submits that the Court of Appeals in the instant case has erroneously applied principles which are correctly applied only in secondary line cases. These principles are enunciated in the decisions cited by the Court of Appeals in the instant case.

See:

Myers v. Shell Oil Co., 96 F. Supp. 670 (S. D. Cal. 1951);

Danko v. Shell Oil Co., 115 F. Supp. 886 (E. D. N. Y. 1953);

Lewis v. Shell Oil Co., 50 F. Supp. 547 (N. D. Ill. 1943).

Petitioner submits that the above cases, and all similar to them, stand for the proposition that a secondary line plaintiff can state no cause of action against his supplier under section 2(a) of the Robinson-Patman Act where the discriminatory sales to him and to *his* competi-

tors by the supplier all are intrastate transactions. In such cases interstate sales by the supplier in areas where plaintiff did not engage in business truly would not be material for only if plaintiff did there compete could that price affect him.

See also

Davidson v. Kansas City Star Co., 202 F. Supp. 613, 618-619 (W. D. Mo. 1962).

On the issue of commerce, it is doubtful if the *Lewis* decision would be the same today, even in a secondary line case, in view of the later decision of this Court in *Standard Oil v. Trade Comm'n.*, 340 U. S. 231, 236-238 (1951).

In secondary line cases, the fact that plaintiff does not compete in the area of defendant's interstate sale is fatal to his action. In a primary line case the fact that a plaintiff does not compete in the area where his competitor, the defendant, made a sale at a different price cannot be fatal to his case because it is not even material to it. Such competition by a primary line plaintiff could add nothing to his cause and would be a fortuitous circumstance just as the existence of competition between the purchasers paying the different prices is immaterial to his cause.

F. T. C. v. Anheuser-Busch, Inc., 363 U. S. 536 (1960);

Moore v. Mead's Fine Bread Co., 348 U. S. 115 (1954).

The other decisions cited by the Court of Appeals are primary line cases but clearly distinguishable from the facts of the instant case for the following brief reasons:

In *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961), cert. denied, 368 U. S. 829, the fact was either that the defendant made no interstate sales or that the product defendant did sell in com-

merce was not of like grade and quality as required by the statute.

In the cases of *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736 (D. Mass. 1955) and *Northern California M. D. Ass'n. v. Interment Ass'n.*, 120 F. Supp. 92 (S. D. Cal. 1954), there were neither facts nor allegations that any of the defendants were engaged in commerce or in making sales in commerce.

Sears, Roebuck & Co. v. Blade, 110 F. Supp. 96 (S. D. Cal. 1953) is to this same effect. In addition, the basic facts in the *Sears* case raise serious questions as to the propriety of the remedy sought under the antitrust laws. This is clear from the language of the court at 101:

> "The long and short of it is that the complaint seeks to come within the ambits of the Sherman Act because the defendant Blade, by a course of conduct with the moving defendants, committed what amounts in the long run to the equivalent of either embezzlement or just plain theft."

In order to make a prima facie case as regards the "commerce" requirement petitioner submits that it need show only that the respondent was engaged in commerce and that respondent made two sales of goods of like grade and quality at two different prices and that one of the prices was charged on a sale in the course of commerce.

F. T. C. v. Anheuser-Busch, Inc., 363 U. S. 536 (1960);

Moore v. Meads Fine Bread Co., 348 U. S. 115 (1954).

The same facts, necessarily, will prevent a summary judgment on the "commerce" issue.

In the instant case there are in the record facts which show that respondent did make interstate sales. Respondent admitted in its answer that it generally engages in interstate commerce. Respondent in 1951 went to court in

West Virginia in order to force the issuance of a permit for it to ship milk from an Ohio plant into West Virginia. The permits were issued and were issued for the year material in this case, 1958. For the purpose of considering summary judgment, this alone should have sufficed to show the existence of an issue of commerce. Respondent's Toledo, Ohio, plant for about five years immediately prior to October 24, 1958 (four days after the respondent's Ohio price reduction) sold milk to the Meadowridge Dairy in Tecumseh, Michigan, a wholesaler, and on October 20, 1958 the price on this interstate sale was different from the price on that day which respondent charged for sales in the Ohio market where plaintiff competed (50a).

Whether the probable prices at which the respondent's milk was resold in Michigan (50a, 51a) can be attributed to respondent for our purpose or whether the only price attributable to respondent is the price the Michigan purchaser paid to respondent, in either event the price is different from that charged in the Ohio market where petitioner competes and the sale is in the course of commerce.

The fact that these interstate sales were made by respondent from Ohio plants other than the one from which distribution was made into the area where petitioner competes is not material for all of the plants are units of respondent corporation and within the definition of "person" as that word is used in the Robinson-Patman Act. 15 U. S. C. § 12.

Wherefore, petitioner prays this Court to grant this petition for Certiorari to review the decision of the Court of Appeals affirming the judgment of the district court.

Respectfully submitted.

KENNETH THORNTON,

Attorney for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decided November 16, 1962.

Before: MILLER, Chief Judge, WEICK and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge. Plaintiff, Willard Dairy Corporation, filed this action in the District Court to recover from the defendants treble damages under Section 2(a) of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, Section 13(a), Title 15, United States Code.

The complaint alleged that the plaintiff was an Ohio corporation with its principal office and place of business at Willard, Huron County, Ohio, and was engaged in the processing and sale of dairy products within an approximate radius of forty miles of the Village of Willard; that the defendant National Dairy Products Corporation was incorporated under the laws of Delaware with its principal office in New York City; that the defendant Sealtest, Inc., was incorporated under the laws of Maryland, with its principal office in New York City; that said defendants were engaged in the processing, sale and distribution in interstate commerce of dairy products; that within the aforesaid marketing area of the plaintiff, the plaintiff and defendants were competitors in the wholesale of milk, plaintiff distributing its milk in said area from its only processing plant in Willard, and defendants distributing its milk in said area from defendants' processing plant in Shelby, Ohio; that defendants also distributed milk from its processing plant in Shelby into an area outside the area of competition between plaintiff and defendants, that being the area in and around the City of Marion, Ohio; that for about two months prior to October 20, 1958, defendants

and plaintiff each sold their respective milk, in the area of their competition, in glass containers at 38 cents per half-gallon and in paper containers at 41 cents per half-gallon; that on October 20, 1958, defendants reduced their prices of said milk in glass containers to 33 cents per half-gallon and in paper containers to 36 cents per half-gallon, but that said price reduction was not made with respect to sales made in and around the City of Marion, in which city the defendants maintained the prices at those prevailing prior to October 20, 1958; and that the milk sold by defendants in the area of competition and around the City of Marion and the milk sold by the plaintiff was of like grade and quality. The complaint alleged that the effect of the defendants' price discrimination was to substantially lessen competition and to destroy competition with defendants by the plaintiff, and that in order to continue in the dairy business it was necessary for plaintiff to sell its milk at the same reduced prices put into effect by the defendants, thus causing the plaintiff loss of revenue and injuring plaintiff's competitive status. The complaint alleged that the plaintiff, as a result of the foregoing, had been damaged in the sum of $25,170.06, and sought damages in the triple amount of $75,510.18.

National Dairy Products Corporation, in its answer denied some of the allegations of the complaint, but admitted that it was engaged in the processing, sale and distribution of dairy products "some of which in some parts of the country move in interstate commerce," and that it sold milk at the prices and during the period alleged in an area of competition between the plaintiff and the defendant, which it claimed was less than that alleged by the plaintiff and which was wholly within the State of Ohio, and that prior prices were maintained after October 20, 1958, in and around the City of Marion. As an affirma-

tive defense National Dairy Products Corporation alleged that the reduction in the price of milk in the area where such reduction was effective was made in good faith to meet an equally low price of a competitor who sold within the said area and did not sell in and around the City of Marion. *Section 13(b), Title 15, United States Code.*

The defendant Sealtest, Inc., claimed that it neither owned nor operated any milk processing plant in Shelby or elsewhere in the State of Ohio, and that it did not buy or distribute milk in the State of Ohio. The record indicates that its chief activities were quality control, research and "Sealtest" national advertising, and it has never engaged in the operating activities of the dairy business. Apparently, no objection is made to the action of the District Court in entering summary judgment in its favor.

Following the filing and answering of certain interrogatories and the taking of certain depositions, the District Court sustained the motion of the National Dairy Products Corporation for summary judgment in its favor, without opinion, from which this appeal was taken.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure,

destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

Section 2(b) of the Act provides that the seller may show as a defense to the charge of price discrimination that his lower price "was made in good faith to meet an equally low price of a competitor, * * *."

The Act applies to discrimination between different purchasers of commodities of like grade and quality, and holds the seller, in such a case, liable. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. (2) 1, 7, C. A. 7th; *General Shale Products Corp. v. Struck Const. Co.*, 132 F. (2) 425, 427, C. A. 6th. The Act has been construed as giving a right of action to a competitor of the seller who is injured in his business thereby as well as to a customer who has been discriminated against. *Ludwig v. American Greetings Corporation*, 264 F. (2) 286, 289, C. A. 6th. However, by the express terms of the statute it is essential to establish a violation that the sale complained of be by a person "engaged in commerce, in the course of such commerce." *Standard Oil Co. v. Trade Comm'n*, 340 U. S. 231, 236-237.

In the present case there is no question but that the defendant was engaged in commerce, but it is contended that the discriminating sales complained of were not made "in the course of such commerce" and therefore were not in violation of the Act. The authorities appear to hold that it is not enough under the Clayton Act, as amended by the Robinson-Patman Act, that the defendant be engaged in interstate commerce but it must also be shown that the sale complained of was one occurring in interstate commerce. *Standard Oil Co. v. Trade Comm'r, supra; Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F. (2)

265, 267, C. A. 7th, cert. denied 368 U. S. 829; *Myers v. Shell Oil Co.*, 96 F. Supp. 670, 675-676, S. D. Cal.; *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739, D. C. Mass.; *Northern California M. D. Ass'n v. Interment Ass'n*, 120 F. Supp. 92, 95, S. D. Cal.; *Danko v. Shell Oil Co.*, 115 F. Supp. 886, E. D. N. Y.; *Lewis v. Shell Oil Co.*, 50 F. Supp. 547, 549, N. D. Ill. See: *Trade Comm'n v. Bunte Bros.*, 312 U. S. 349. In *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, relied upon by appellant, purchases involved in the alleged discrimination were in interstate commerce and interstate sales of like grade and quality were discriminated against. *Central Ice Cream Co. v. Golden Rod Ice Cream Co., supra*, 287 F. (2) 265, 267, C. A. 7th.

The cases recognize a distinction between the commerce which is covered by the Sherman Act and that covered by the Robinson-Patman Act. "In an action brought under the Robinson-Patman Act, it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce." *Lewis v. Shell Oil Co., supra*, 50 F. Supp. 547, 549, N. D. Ill.; *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. 96, 101, S. D. Cal.; *Myers v. Shell Oil Co., supra*, 96 F. Supp. 670, 675, S. D. Cal.; *Central Ice Cream Co v. Golden Rod Ice Cream Co., supra*, 287 F. (2) 265, 267, C. A. 7th, cert. denied, 368 U. S. 829. Accordingly, cases involving liability under the Sherman Anti-Trust Act where it was sufficient to show that the sales *affected* interstate commerce are not applicable to our present case.

In the present case, the price discrimination relied upon was by reason of sales in the area of competition and sales in and around the City of Marion, Ohio. These sales

by the defendant were from defendant's processing plant in Shelby, Ohio, and were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act. The fact that defendant also made interstate shipments from other than its Shelby Ohio, plant to areas in which the plaintiff did not engage in business is immaterial to the issue in this case. *Davidson v. Kansas City Star Company*, 202 F. Supp. 613, 618-619, W. D. Mo.

For this reason alone, based on undisputed facts, it was not error for the District Judge to sustain defendants' motions for summary judgment. What dispute there may be about other factual questions, can be disregarded, in that such issues pertain to other defenses put forward by National Dairy Products Corporation, which, in view of the present ruling, it is unnecessary to consider.

In view of the foregoing ruling and the undisputed facts which are present in the record, we find no prejudicial error in the rulings of the District Judge on questions of evidence and in overruling appellant's motions to file an amended complaint and to dismiss the action without prejudice. Such motions made by a plaintiff after a responsive pleading has been filed by the defendant, are addressed to the judicial discretion of the Court. *Rules 15(a) and 41(a)(2), Rules of Civil Procedure. Wibbelman v. Home Ins. Co.*, 194 F. (2) 262, C. A. 6th; *Shaffer v. Evans*, 263 F. (2) 134, C. A. 10th, cert. denied, 359 U. S. 990.

The judgment is affirmed.

JUDGMENT.

(Filed November 16, 1962.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

STATUTES AND RULES.

15 U. S. C. § 12.

"The word "person" or "persons," wherever used in sections 12, 13, 14-21 and 22-27 of this title, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Rule 56, Federal Rules of Civil Procedure (Summary Judgment).

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

Statute Granting Jurisdiction 28 U. S. C. § 1254.

Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. § 13(a).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them;

PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences

in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered; * * *

AND PROVIDED FURTHER, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade;

AND PROVIDED FURTHER, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.